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MBSB Bank Bhd v Erakemas Sdn Bhd

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HIGH COURT (PENANG) — WINDING UP PETITION NO PA–28NCC–86–07 OF 2023
KENNETH ST JAMES JC
15 JULY 2024

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Companies and Corporations — Winding up — Petition — Respondent failed to comply petitioner's statutory notice under s 466 of Companies Act 2016 — Petitioner presented winding up petition against respondent — Respondent applied to stay winding up petition — Whether respondent's application for stay winding up proceeding should be granted — Whether petitioner's winding up petition should be allowed

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The Ministry of Education ('MOE') awarded a contract to the respondent to build a school. The petitioner granted banking facilities to the respondent to carry out the construction contract. However, the respondent defaulted and the petitioner filed a civil suit against the respondent. The petitioner and respondent then recorded a consent order for the respondent to pay the petitioner approximately RM2.812m and other amounts ('the judgment debt'). The respondent nevertheless defaulted under the consent order. The petitioner issued and served s 466 of the Companies Act 2016 statutory notice on the respondent but the respondent failed to comply. The petitioner thus presented a winding up petition against the respondent. The respondent filed an application to stay the winding up petition submitting that: (a) the respondent was required to open a revenue collection account operated by the petitioner in order to receive the contract payments from the MOE; (b) the respondent defaulted in paying the judgment debt and hence failed to pay the amount demanded under the s 466 statutory notice because the MOE did not pay the contract proceeds into the revenue collection account; and (c) the MOE owed the respondent a combined amount of RM4.512m, which was more than enough to satisfy the statutory notice demand for approximately RM2.865m and once the MOE makes these payments, the respondent would be able to pay the judgment debt to the petitioner. In opposing the petitioner's winding up petition, the respondent argued that: (i) the s 466 statutory demand amount was not verified and the respondent had made part payments totalling RM50,000 to the petitioner; and (ii) it should not be wound up as it was a solvent company and when the MOE money came in, it would be able to pay off the judgment debt.

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Held, dismissing the application to stay the winding up petition; and allowing the winding up petition:

(1) The asserted promise-to-pay from the MOE was made in August 2023. At the hearing of the respondent's stay application, nine months had lapsed but no payment was made. The respondent had not produced any evidence that the MOE had paid the respondent or paid money into the revenue collection account. This unsubstantiated and unrealised ground could hardly be considered an appropriate reason to stay the winding up petition. Nor could it be considered a special circumstance that warranted a stay. When the respondent failed to satisfy the petitioner's s 466 statutory demand within the prescribed time, the respondent was deemed to be unable to pay its debt to the petitioner. The question that must be considered was whether the respondent could have paid the judgment debt to the petitioner, and not whether the respondent would receive, or would likely receive, payments from the MOE so that its judgment debt could later be paid. There was no special circumstance that justified a stay of the winding up petition (see paras 19–21).

(2) It was for the respondent to demonstrate that it was able to pay its debts. If it did not have sufficient current assets available to meet its current liabilities, then it was commercially insolvent and could be wound up. The petitioner had the right to petition to wind up the respondent so that the liquidation process can distribute the respondent's assets to settle its debts to the creditors. Next, the factor to consider in the winding up petition was the respondent's inability to pay its debts 'as and when they fall due'. This inability to pay its debts was evinced by the respondent's failure to settle the s 466 statutory demand made by the petitioner. Lastly, when there was no doubt that the respondent was deemed unable to pay its debt to the petitioner and was therefore commercially insolvent, it would be unjust to dismiss the winding up petition just because the respondent raised a question about the precise amount owing, because it had made part-payments. The s 466 statutory demand amount was approximately RM2.865m. The respondent's total part-payment was only RM50,000, a very small portion of the demanded debt. The respondent was obviously currently unable to pay its judgment debt to the petitioner. In the premises, the petitioner had demonstrated that the respondent was deemed unable to pay the judgment debt and thus, the respondent should be wound up (see paras 25, 27, 29 & 31).

[Bahasa Malaysia summary

Kementerian Pendidikan ('MOE') telah memberikan kontrak kepada responden untuk membina sebuah sekolah. Pempetisyen memberikan kemudahan perbankan kepada responden untuk melaksanakan kontrak pembinaan tersebut. Walau bagaimanapun, responden telah ingkar dan pempetisyen telah memfailkan saman sivil terhadap responden. Pempetisyen

dan responden kemudian merekodkan perintah persetujuan bagi responden untuk membayar pempetisyen sebanyak kira-kira RM2.812 juta dan jumlah lain ('hutang penghakiman'). Namun, responden tetap ingkar di bawah perintah persetujuan tersebut. Pempetisyen telah mengeluarkan dan menyampaikan s 466 Akta Syarikat 2016 notis berkanun kepada responden tetapi responden gagal mematuhinya. Pempetisyen dengan itu telah mengemukakan petisyen penggulungan terhadap responden. Responden memfailkan permohonan untuk menangguhkan petisyen penggulungan dengan menyatakan bahawa: (a) responden dikehendaki membuka akaun kutipan hasil yang dikendalikan oleh pempetisyen untuk menerima pembayaran kontrak daripada MOE; (b) responden gagal membayar hutang penghakiman dan oleh itu gagal membayar jumlah yang dituntut di bawah s 466 notis berkanun kerana MOE tidak membayar hasil kontrak ke dalam akaun kutipan hasil; dan (c) MOE berhutang kepada responden sejumlah RM4.512 juta, yang lebih daripada cukup untuk memenuhi permintaan notis berkanun kira-kira RM2.865 juta dan sebaik sahaja MOE membuat pembayaran ini, responden akan dapat membayar hutang penghakiman kepada pemohon. Dalam menentang petisyen penggulungan pemohon, responden berhujah bahawa: (i) jumlah tuntutan statutori s 466 tidak disahkan dan responden telah membuat pembayaran sebahagian sebanyak RM50,000 kepada pemohon; dan (ii) ia tidak seharusnya digulung kerana ia adalah syarikat solven dan apabila wang MOE masuk, ia akan dapat menyelesaikan hutang penghakiman.

Diputuskan, menolak permohonan penangguhan petisyen penggulungan; dan membenarkan petisyen penggulungan:

(1) Janji pembayaran yang dinyatakan oleh MOE telah dibuat pada bulan Ogos 2023. Pada pendengaran permohonan penangguhan responden, sembilan bulan telah berlalu tetapi tiada pembayaran yang dibuat. Responden tidak mengemukakan sebarang keterangan bahawa MOE telah membayar responden atau membayar wang ke dalam akaun kutipan hasil. Alasan yang tidak disokong dan tidak direalisasikan ini sukar untuk dianggap sebagai alasan yang sesuai untuk menangguhkan petisyen penggulungan. Ia juga tidak dapat dianggap sebagai keadaan khas yang membenarkan penangguhan. Apabila responden gagal memenuhi tuntutan statutori pempetisyen di bawah s 466 dalam tempoh yang ditetapkan, responden dianggap tidak mampu membayar hutangnya kepada pempetisyen. Soalan yang perlu dipertimbangkan adalah sama ada responden mampu membayar hutang penghakiman kepada pempetisyen, dan bukannya sama ada responden akan menerima, atau berkemungkinan menerima, pembayaran daripada MOE supaya hutang penghakimannya boleh dibayar kemudian. Tiada keadaan khas yang membenarkan penangguhan petisyen penggulungan (lihat perenggan 19–21).

(2) Adalah untuk responden menunjukkan bahawa ia mampu membayar hutangnya. Jika ia tidak mempunyai aset semasa yang cukup untuk memenuhi liabiliti semasanya, maka ia adalah tidak solven secara komersial dan boleh digulung. Pempetisyen mempunyai hak untuk membuat petisyen untuk menggulung responden supaya proses penggulungan dapat mengagihkan aset responden untuk menyelesaikan hutangnya kepada pemiutang. Seterusnya, faktor yang perlu dipertimbangkan dalam petisyen penggulungan adalah ketidakupayaan responden untuk membayar hutangnya 'jika dan apabila ia perlu dibayar'. Ketidakupayaan untuk membayar hutang dibuktikan oleh kegagalan responden untuk menyelesaikan tuntutan berkanun di bawah s 466 yang dibuat oleh pempetisyen. Akhir sekali, apabila tidak ada keraguan bahawa responden dianggap tidak mampu membayar hutangnya kepada pempetisyen dan oleh itu adalah tidak solven secara komersial, adalah tidak adil untuk menolak petisyen penggulungan hanya kerana responden mengemukakan persoalan mengenai jumlah tepat yang terhutang, kerana ia telah membuat sebahagian pembayaran. Jumlah tuntutan berkanun s 466 adalah kira-kira RM2.865 juta. Jumlah sebahagian pembayaran responden hanya RM50,000, iaitu bahagian yang sangat kecil daripada hutang yang dituntut. Responden jelas tidak mampu pada masa ini untuk membayar hutang penghakimannya kepada pempetisyen. Oleh itu, pempetisyen telah menunjukkan bahawa responden dianggap tidak mampu membayar hutang penghakiman dan dengan itu, responden harus digilung (lihat perenggan 25, 27, 29 & 31).]

Cases referred to

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187; [2001] 3 AMR 2893; [2001] 3 CLJ 248; [2001] 1 MLRA 270, CA (refd)

Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd [1998] 3 MLJ 810; [1999] 5 CLJ 145; [1998] 3 MLRH 744; [1998] AMEJ 0337, HC (folld)

Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313; [1992] 1 CLJ 637; [1992] 1 MLRA 311, SC (refd)

Legislation referred to

Companies Act 2016 s 465(1)(e), 465(1)(h), 466, 466(1)(a), 469(1)(b), (1)(c)

Lim Pey Tsyr (with Eunice Aw Shze Xian) (Kee Sern, Siu & Huey) for the petitioner.

Mashitah bt Jamaluddin @ Mohammad Shukri (Rosli Ismail & Co) for the respondent.

Kenneth St James JC:

PRELUSION

[1] The respondent ('R') applies for a stay of this winding up proceeding pending the Ministry of Education's ('MOE's') payment of Interim Certificate No 58 and Interim Certificate No 59 to R.

[2] Should a stay of proceedings be granted?

THE PERTINENT FACTS AND CHRONOLOGY OF PROCEEDINGS

[3] The MOE awarded a contract to R to build a school. The petitioner ('P') granted banking facilities to R to carry out the construction contract. R defaulted. P filed a civil suit against R.

[4] On 12 April 2023, P and R recorded a consent order for R to pay P approximately RM2.812m and other amounts ('judgment debt'). The judgment debt was to be paid from the contract payments the MOE pays R for the construction contract. But if R does not receive the contract payments from the MOE, the judgment debt must still be paid by R. R defaulted under the consent order.

[5] In June 2023, P issued and served the s 466 Companies Act 2016 statutory notice on R. R failed to comply.

[6] In July 2023, P presented this winding up petition against R.

[7] In September 2023, R filed an application to stay this petition. I fixed R's stay application and the petition to be heard one-after-the-other on the same date — 31 May 2024.

THE LAW ON WINDING UP PETITIONS AND STAY OF WINDING UP PROCEEDINGS

[8] P petitions to wind up R under the following provisions of the Companies Act 2016 ('the CA 2016').

[9] Section 465(1)(e) of the CA 2016 provides that a company can be wound up if it is 'unable to pay its debts'. Section 465(1)(h) provides that a company can also be wound up if it is just and equitable to wind it up.

[10] Section 466(1)(a) is the deeming section that provides that a company is deemed to be 'unable to pay its debts' if a creditor issues and serves on the

company the prescribed statutory notice to demand the amount due and payable, and the company does not pay the amount after 21 days.

[11] R applies for a stay of the winding up proceedings under the following provisions of the CA 2016.

[12] Section 469(1)(b) provides that on the hearing of the petition, the court can 'adjourn the hearing conditionally or unconditionally'.

[13] Section 469(1)(c) provides that on the hearing of the petition, the court can 'make any interim or any other Order that the Court thinks fit'.

R'S STAY APPLICATION

R's ground for a stay

[14] The purpose that R took the banking facility from P was to finance the performance of the construction contract with the MOE. R was required to open a Revenue Collection Account (operated not by R, but by P). This Revenue Collection Account was to receive the contract payments from the MOE.

[15] R submits that it defaulted in paying the judgment debt and hence failed to pay the amount demanded under the s 466 statutory notice solely because the MOE did not pay the contract proceeds into the Revenue Collection Account. In other words, this petition would have been redundant if the MOE had made payments into R's account.

[16] R further submits that the MOE owes R the amount under Interim Certificate No 58 for approximately RM2.185m, and the amount under Interim Certificate No 59 for approximately RM2.327m. This combined amount of RM4.512m is more than enough to satisfy the statutory notice demand for approximately RM2.865m.

[17] R argues that once the MOE makes these payments, R will be able to pay the judgment debt to P.

[18] R produces a letter dated 7 August 2023 from the MOE, promising that the money will be paid over once the Ministry of Economy and the Ministry of Finance give their approval. R also produced another letter, which was dated 20 September 2023 from the MOE, making the same promise.

My findings

[19] First — the asserted promise-to-pay from MOE was made in August 2023. At the hearing of R's stay application (on 31 May 2024), nine months had lapsed. No payment was made. R has not produced any evidence that MOE has paid R or paid money into the Revenue Collection Account. This unsubstantiated and unrealised ground can hardly be considered an appropriate reason to stay this winding up petition. Nor can it be considered a special circumstance that warrants a stay.

[20] Second — when R failed to satisfy P's s 466 statutory demand within the prescribed time, R was deemed to be unable to pay its debt to P. The question that I must consider is whether R could have paid the judgment debt to P, and *not* whether R will receive, or will likely receive, payments from the MOE so that its judgment debt could later be paid.

[21] I am therefore compelled to find that there is no special circumstance that justifies a stay of this winding up petition. I see no reason to adjourn the hearing of this petition, conditionally or unconditionally. I also see no fit reason to make an interim or final order to stay this petition.

P'S WINDING UP PETITION

R's opposing arguments

[22] One — R argues that the s 466 statutory demand amount is not verified. R argues that P has not produced a statement of account that shows that the amount demanded by P in the statutory notice is the correct amount of the judgment debt due at the time. R submits that it had made two RM25,000 part payments (total: RM50,000) to P and it is not known whether P has accounted for those payments.

[23] In reply, P avers that the RM50,000 part-payment was accounted for before P issued the s 466 statutory demand.

[24] Two — R submits that it is a solvent company. R submits that when the MOE money comes in, it will be able to pay off the judgment debt. It should not be wound up.

My findings

[25] First—it is for R to demonstrate that it is able to pay its debts. If it does not have sufficient current assets available to meet its current liabilities, then it is commercially insolvent and can be wound up. P has the right to petition to wind up R so that the liquidation process can distribute R's assets to settle its debts to the creditors — *Sri Hartamas Development Sdn Bhd v MBf Finance*

Bhd [1992] 1 MLJ 313; [1992] 1 CLJ 637; [1992] 1 MLRA 311 (SC).

[26] In *Sri Hartamas* the Supreme Court held (at MLJ p 320, paras B-E):

> ... In this case, *the presumption of insolvency arises when the requirements of* s 218(2)(a) of the Act [note: equipollent to s 466(1)(a) of the CA 2016] *have been satisfied and it is for the company to prove that it is able to pay its debts*. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case and cite the following observations from *Buckley on the Companies Act* (13th Ed) at p 460:
>
> > In such a case *it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test.* A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet *if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.*
>
> Applying the test in the above-quoted observations, we therefore held that the learned judge had exercised his discretion correctly in ordering the appellant to be wound up.(Emphasis added.)

[27] Second — the factor to consider in this winding up petition is R's inability to pay its debts 'as and when they fall due'. This inability to pay its debts is evidenced by R's failure to settle the s 466 statutory demand made on it by P — *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 AMR 2893; [2001] 3 CLJ 248; [2001] 1 MLRA 270 (CA).

[28] In *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187; [2001] 3 AMR 2893; [2001] 3 CLJ 248; [2001] 1 MLRA 270 the Court of Appeal propounded (at MLJ p 198):

> But a petition for winding up is not execution, for *a winding up petition* is not based upon any judgment of a court. Normally, it *is based on the inability of a company to pay its debts as and when they fall due*. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act [note: equipollent to s 466 of the CA 2016] ... (Emphasis added.)

[29] Third — when there is no doubt that R is deemed unable to pay its debt to P and is therefore commercially insolvent, it would be unjust to dismiss this winding up petition just because R raises a question about the precise amount owing, because it has made part-payments. Here, the s 466 statutory demand amount is approximately RM2.865m. R's total part-payment is only RM50,000, a very small portion of the demanded debt. R is obviously currently unable to pay its judgment debt to P — *Pioneer Concrete (M) Sdn Bhd v Celini Corp Sdn Bhd* [1998] 3 MLJ 810; [1999] 5 CLJ 145; [1998] 3 MLRH 744; [1998] AMEJ 0337 (HC).

[30] In *Pioneer Concrete* , the High Court is instructive when it held (at MLJ p 814):

... A passage from the judgment of Plowman J. In *Re Tweeds Garages Ltd* [1962] 1 Ch D 406 merits reproduction. That passage would nip in the bud the problem ... and that passage reads as follows (see pp 413–414 of Plowman J's decision):

> From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that *it would*, in many cases, *be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing*. If I may refer to an example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. *Is the company to be entitled to say: 'It is not disputed that you are a creditor but the amount of your debt is disputed and you are not, therefore, entitled to an order?' I think not.* In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, *a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.*

In my judgment, the debt incurred by the respondent to the tune of RM462,819.50 was not in dispute at all. Inability to pay debts under s 218(1)(e) of the Companies Act 1965 is a common ground for a winding-up order. It is a correct statement of the law to say and I so say that *prima facie, the petitioner as a creditor who is not paid has a right to file a petition for winding-up*, whatever the motives may be. The court is not concerned about the motives of the petitioner here in winding-up the respondent (*Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95). *It is germane to mention that the test of commercial insolvency is simple. It is this. Whether the company is unable to meet its current debts as they fall due?* A company may have substantial wealth which cannot be realized immediately and if that happens the company is said to be unable to pay its debts within the purview and ambit of s 218(1)(e) of the Companies Act 1965 and this is so even though on liquidation the company will be able to meet all its liabilities ...

[31] In the premises, I find that P has demonstrated that R is deemed unable to pay the judgment debt, and as the cause papers are in order, P should be wound up. In this regard, there is no need for me to determine whether it is just and equitable to wind up R under s 465(1)(h) of the CA 2016.

CONCLUSION

[32] For the above reasons, concerning R's application to stay this winding up petition pending the MOE's payment of the amounts under the two Interim Certificates, I dismiss it with costs of RM7,000 to be paid by R to P by 1 July 2024. Costs are subject to the allocatur.

[33] Concerning the winding up petition, I allow it with costs of RM12,000 to be paid out of R's assets. Costs are also subject to the allocatur.

Application to stay winding up petition dismissed; and winding up petition allowed.

Reported by Nabilah Syahida Abdullah Salleh